

DEPARTMENT OF STATE REVENUE

**LETTER OF FINDINGS NUMBER: 98-0416
GROSS INCOME TAX
FOR TAX PERIODS: 1994-1995**

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Issue

Gross Income Tax: Agency Receipts

Authority: IC 6-2.1-2-2, 45 IAC 45-1-1-54.

Taxpayer protests the assessment of gross income tax on receipts which Taxpayer claims constitute exempt agency receipts.

Statement of Facts

Taxpayer is a non-profit corporation organized to provide non-dealer specific advertising for a particular brand of product in one area of the state. Taxpayer is the corporation acting between the national producer and the local dealers of the product. Taxpayer receives payments from the national producer. Taxpayer protested this assessment. More facts will follow as necessary.

Gross Income Tax: Agency Receipts

Discussion

IC 6-2.1-2-2 imposes a gross income tax on the gross receipts of taxpayers domiciled in Indiana. Pursuant to 45 IAC 45-1-1-54, income received in an agency capacity is not subject to the gross income tax. The issues to be determined are whether the receipts upon which the Indiana Department of Revenue assessed gross income tax were received in an agency capacity and whether Taxpayer had any right, title, or interest in those funds. If those two tests are met, the funds qualify for exemption from the gross income tax.

45 IAC 1-1-54 sets forth the following two requirements for a taxpayer to be able to deduct income received in an agency capacity from the income upon which the gross receipts tax is imposed.

- (1) The taxpayer must be a true agent. Agency is a relationship which results from the manifestation of consent by one person to another authorizing the other to act on his behalf and subject to his complete control, and consent by the other to so act. Agency may be established by oral or written contract, or may be implied from the conduct of the parties. However, the representation of one party that he is an agent of another without a manifestation of consent by the alleged principal is insufficient to establish agency. Both parties must intend to act in such a relationship. Characteristic of agency is the principal's right to complete and continuous control over the acts of the agent throughout the entire performance of the contract. This right to control cannot be limited to the accomplishment of a desired result. In addition, the principal must be liable for the authorized acts of the agent.
- (2) The agent must have no right, title or interest in the money or property received or transferred as an agent. In other words, the income received for work done or services performed on behalf of a principal must pass intact to the principal or a third party; the agent is merely a conduit through which the funds pass. . .

In summary, when applying the above factors to a taxpayer, the critical factor is that of control. Notwithstanding the fact that the taxpayer acting for another has no right, title or interest in the money or property received, he is not entitled to deduct such income from his gross receipts unless he was acting as a true agent subject at all times

It is a question of fact to determine whether or not a particular taxpayer received income in an agency capacity. To determine whether or not this Taxpayer received the income upon which the Auditor assessed gross income tax in an agency capacity, one must review the facts of the situation.

Prior to Taxpayer's incorporation, all non-dealer specific advertising was prepared by and controlled by the national producer. At one point, the national producer instructed the local dealers to form a non-profit organization to take care of the region's non-dealer specific advertising on the behalf of the national producer. The national producer issued an extensive policies and procedures manual that delineates how Taxpayer was to manage the regional advertising. The manual gave specific instructions on how Taxpayer was to be incorporated, how it was to handle its internal affairs, how Taxpayer would proceed with its day to day activities, how Taxpayer would receive funds, how it was to be determined the amount of funds that Taxpayer would receive, how Taxpayer would turn in monthly accountings of funds received and how Taxpayer would spend the funds. Documentation indicates that the national producer retained the right to modify the relationship at will. On December 16, 1998, the national producer announced that it would make production of regional advertising an in-house function again. Therefore, Taxpayer is in the process of winding down its affairs.

Documentation indicates that the national producer is granted certain aspects of control over Taxpayer. The primary area where the national producer was not granted control in the documentation was in the choice of automotive models to advertise, certain aspects of the production of the advertising and the media to be used in the advertising.

However, it is unnecessary to determine if Taxpayer's fact situation constitutes an agency relationship because Taxpayer fails the second portion of the test. Taxpayer has some discretion in how to spend the funds designated for advertising. Taxpayer chooses which models to advertise and which media to use. Nor are the funds received as direct reimbursement for an expenditure such as payment of a particular type of liability. Therefore, Taxpayer is actually exercising control over the use of the advertising funds. Taxpayer does not pass the funds through to a third party intact. Taxpayer does not qualify for exemption pursuant to 45 IAC 1-1-54 (2).

Finding

Taxpayer's protest is denied.

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